

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 629

THE UNITED STATES OF AMERICA, APPELLANT

& VS.

PHILIP LEPOWITCH AND MARVIN SPECTOR

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI**

FILED JANUARY 6, 1943

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1 [Citation in usual form showing service on Henry S. Janan, filed Nov. 27, 1942, omitted in printing.]

8 In United States District Court Eastern District of Missouri, Eastern Division

Record entry as to filing of indictment

September 18, 1942

In re Grand Jury

The Grand Jurors of the United States in and for the Eastern Judicial District of Missouri, heretofore empaneled, sworn and charged at the present March 1942 Term of this District Court, this day return into Court the following numbered indictments, viz: Nos. 22978 to 23114, both inclusive, which said indictments are duly received by the Court, ordered filed and *filed* and each of said indictments being endorsed "A True Bill by Jno. S. Wood, Foreman" and each of said indictments being filed and numbered by the Clerk as follows:

Included among the indictments filed is No. 23034, United States of America vs. Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker.

And now the Grand Jury advising the Court through their Foreman that they have no further business before them and having completed investigation of the matters presented to them as such Grand Jurors, and the United States Attorney likewise advising the Court that he knows of no further matters to be presented to said Grand Jurors, the Court doth thereupon order that the said Grand Jurors be and they are finally excused from further attendance as such Grand Jurors for the March Term, A. D. 1942 of this Court.

9 In United States District Court, Eastern Division of the Eastern Judicial District of Missouri

23034

Indictment

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the March Term thereof, A. D. 1942.

The Grand Jurors for the United States of America, duly empaneled, sworn and charged in and for the District Court of the United States, within and for the Eastern Judicial District of

Missouri, and inquiring in and for said Judicial District, at the March Term, A. D. 1942, of the Eastern Division of said Judicial District, upon their oaths present and charge:

That on or about the 1st day of September A. D. 1942, at the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker, hereinafter referred to as the defendants, with intent to defraud one Mrs. Adele Silk, did then and there unlawfully, knowingly, falsely, and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and did then and there falsely take upon themselves to act as such by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one Abe Zaidman; they, the said defendants not being then and there officers or employees acting under the authority of the United States, or of any department thereof, as they, the said defendants, then and there well knew;

10 Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

18 USC 76.

F nm 1000 or I nm 3 y or b

SECOND COUNT

The Grand Jurors aforesaid, upon their oaths aforesaid, do further present and charge:

That on or about the 1st day of September A. D. 1942, at the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker, hereinafter referred to as the defendants, with intent to defraud one Mrs. Adele Silk, did then and there unlawfully, knowingly, falsely, and feloniously assume and pretend to be officers and employees acting under the authority of the United States, to wit, agents of the Federal Bureau of Investigation, and in such pretended character did demand from the said Mrs. Adele Silk a valuable thing, to wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman; they, the said

defendants, not being then and there officers or employees acting under the authority of the United States, or of any department thereof, as they, the said defendants, then and there well knew;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

18 USC 76.

F nm 1000 or I nm 3 y or b.

(Signed) HARRY C. BLANTON,
United States Attorney.

11 [Indictment:] Violation of Sec. 76, Title 18, U. S. C. A true bill, Jno. S. Wood, Foreman. Filed in open court this — day of Sept. 18, 1942. James J. O'Connor, Clerk. Harry C. Blanton, United States Attorney.

12 In United States District Court

Record entry as to filing of joint demurrer, and order and judgment sustaining same

October 26, 1942

This day comes the United States of America, appearing by the United States Attorney, and come also the defendants, Philip Lepowitch, alias Phil Stewart; and Marvin Spector, alias Louis Baker, appearing by counsel; whereupon said defendants file herein their joint demurrer to each of Counts one and two of the Indictment in this cause, which said demurrer is argued before and submitted to the Court; and the Court, after due consideration of the same, doth Order that said demurrer be and the same is sustained as to each of said defendants in accordance with memorandum opinion this day filed.

And it is further ordered and adjudged, pursuant to the finding of the Court as aforesaid, that the Indictment herein be and the same is dismissed as to each of the said defendants, Philip Lepowitch, alias Phil Stewart, and Marvin Spector, alias Louis Baker.

13 In United States District Court in and for the Eastern
District of the Eastern Judicial Division of Missouri
No. 23034—Div. No. 2

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR,
ALIAS LOUIS BAKER, DEFENDANTS

Joint demurrer of defendants to indictment

Filed October 26, 1942

Comes now Philip Lepowitch and Marvin Spector, defendants in the above-entitled action, and demur to each and every Count of the Indictment herein, and as grounds therefor, respectfully represents that:

1. Count One of the Indictment fails to state facts sufficient to charge defendants with the commission of a criminal offense against the United States of America.

2. Count Two of the Indictment fails to state facts sufficient to charge defendants with the commission of a criminal offense against the United States of America.

Wherefore, defendants pray an order of this Court sustaining their joint demurrer to each and every count of the Indictment.

s. HENRY S. JANON,
Attorney for Defendants.

14 In the United States District Court, Eastern District
of Missouri, Eastern Division

No. 23034

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP LEPOWITCH, ALIAS PHIL STEWART, AND MARVIN SPECTOR,
ALIAS LOUIS BAKER, DEFENDANTS

Opinion

Filed October 26, 1942

This matter comes on for determination under a joint demurrer to the indictment filed on behalf of the defendants. The grand jury has returned an indictment in which the defendants are

charged with violating Section 76, Title 18, United States Code, wherein it is alleged that the defendants falsely assumed and pretended to be agents of the Federal Bureau of Investigation. The indictment is so drawn as to be intended to reach both features of the statute—namely, count one is drawn under the phraseology of the statute covering the activities of one who falsely, in the pretended capacity, takes upon himself to act as such, while count two of the indictment covers the other feature of the statute wherein one in such false and assumed character demands from another a valuable thing.

In the first count the indictment alleges that the defendants did falsely take upon themselves to act in the capacity of agents of the Federal Bureau of Investigation by "demanding of and from the said Mrs. Adele Silk that she give the defendants
15 information of and concerning the whereabouts of Abe Zaidman." The second count alleges that defendants in their pretended character "did demand from the said Mrs. Adele Silk a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman."

The demurrer is based upon one ground only—namely, that the indictment fails to state facts sufficient to charge defendants with a commission of a criminal offense against the United States of America.

The validity of Section 76, Title 18, United States Code, is not raised by the demurrer, and accordingly there is no constitutional question involved. We are concerned here only with the one feature, that of determining whether the indictment pleads facts sufficient to constitute an offense within the terms of the statute. The language of the statute is fairly clear to the extent that intent to defraud either the United States or any person is a necessary element of the offense, coupled with falsely assuming or pretending to be an officer or employee acting under the authority of the United States or some department thereof, or a corporation owned or controlled by the United States. Present these two conditions the statute may be violated in either of two ways condemned as illegal. First, by one taking upon himself to act in the falsely pretended character, or secondly by demanding or obtaining from any person or from the United States "any money, papers, document, or other valuable thing." Hence, the demurrer here raises the issue as to whether the defendants in falsely pretending to be agents of the Federal Bureau of Investigation and demanding of
16 Mrs. Silk that she give the defendants information concerning the whereabouts of one Abe Zaidman constitutes on the one hand taking upon themselves to act as Federal Bureau of

Investigation agents, or on the other hand constitutes demanding of Mrs. Silk "a valuable thing" within the meaning of the statute.

It is my view that the action of these defendants, while highly reprehensible, does not come within the terms of the statute. The action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not in my opinion taking upon themselves to act as Federal Bureau of Investigation agents, nor was the information demanded by them "a valuable thing" within the meaning of the statute. It follows that the demurrer to the indictment should be sustained.

It is so ordered.

(S) GEO. H. MOORE,
United States District Judge.

Dated at St. Louis, Missouri, this 26th day of October A. D. 1942.

17 In United States District Court

Record entry of filing of plaintiff's petition for appeal, assignments of error and jurisdictional statement

November 25, 1942

This day comes the United States of America, appearing by the United States Attorney, and files and presents to the Court its petition praying for the allowance of an Appeal to the United States Supreme Court from the order and judgment entered in this cause sustaining the joint demurrer by the defendants to the indictment in this cause and dismissing said indictment, together with its Assignments of Error on such proposed appeal and Statement as to Jurisdiction pursuant to Rule 12 of the United States Supreme Court;

Whereupon the Court, in order filed and entered herein this day, doth allow said appeal as prayed for and directs the issuance of a citation directed to defendants.

18 In United States District Court

[Title omitted.]

Petition for appeal

Filed November 25, 1942

Comes now the United States of America, plaintiff herein, and states that, on the 26th day of October, 1942, the District Court

of the United States for the Eastern District of Missouri, Eastern Division, sustained a demurrer to Counts 1 and 2 of the indictment herein, and the United States of America; feeling aggrieved at the ruling of said District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
HARRY C. BLANTON,
*United States Attorney,
Eastern District of Missouri.*

19

In United States District Court

[Title omitted.]

Assignments of error

Filed November 25, 1942

Comes now the United States of America, by Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and avers that in the record, proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

I. That the Court erred in sustaining as to Counts 1 and 2 the demurrer to the indictment.

II. That the Court erred in holding that "the action of the defendants, in their false and pretended character of Federal Bureau of Investigation agents, in demanding that Mrs. Silk inform the defendants as to where Abe Zaidman was located or could be found, is not * * * taking upon themselves to act as Federal Bureau of Investigation agents * * *" within the meaning of Section 32 of the Criminal Code (18 U. S. C. 76), upon which Count 1 of the indictment was predicated.

III. That the Court erred in holding that "the information demanded by" the defendants was not "a valuable thing" within the meaning of section 32 of the Criminal Code (18 U. S. C. 76), upon which Count 2 of the indictment was predicated.

HARRY C. BLANTON,
*United States Attorney,
Eastern District of Missouri.*

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed November 25, 1942

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment in this cause sustaining a demurrer by the defendants to Counts 1 and 2 of the indictment in said cause, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered such petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court ordered and judged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court in sustaining the demurrer of the defendants to the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered that the United States of America be, and it is hereby, permitted a period of forty (40) days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at St. Louis, Missouri this 25th day of November, 1942.

By the Court:

Geo. H. Moore

United States District Judge.

Record entry of issuance of citation and filing of return; filing of process and return as to service in compliance with provisions of Supreme Court rule.

November 27, 1942

This day citation on the appeal heretofore allowed plaintiff from judgment entered sustaining demurrer of defendants to indictment herein and dismissing said Indictment, is signed by the Court and issued directed to the defendants herein citing and admonishing them to be and appear at and before the Supreme

Court of the United States at Washington, D. C., within forty (40) days from and after this date, which citation is acknowledged by attorney for appellees, and filed.

And now plaintiff files herein its praecipe for transcript of record on said appeal to the United States Supreme Court, together with plaintiff's notice to defendants, bearing endorsed thereon, acknowledgment thereof, by counsel of defendants of service of petition for appeal, assignments of error, order allowing appeal and Statement of Jurisdiction, as provided by Rule 12, Section 2 of the Supreme Court Rules, as well as directing attention of defendants to certain provisions of said Rule.

23 In United States District Court

Praecipe for transcript of record

Filed November 27, 1942

To the CLERK, *United States District Court for the Eastern District of Missouri:*

The appellant hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Missouri, in connection with its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of indictment, filing of demurrer and entry of order and judgment sustaining demurrer.

2. Indictment.

3. Demurrer.

4. Opinion sustaining demurrer.

5. Petition for appeal to the Supreme Court.

6. Statement of jurisdiction of the Supreme Court.

7. Assignment of error.

8. Order allowing appeal.

9. Notice of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement as to jurisdiction.

10. Citation.

Praecipe.

HARRY C. BLANTON,
*United States Attorney,
Eastern District of Missouri.*

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 27th day of November 1942.

HENRY S. JANON,
Counsel for Appellees.

10 UNITED STATES VS. LEPOWITCH AND SPECTOR

24 [Clerk's certificate to foregoing transcript omitted in
printing.]

25 In the Supreme Court of the United States

October Term, 1942

No. 629

Statement of points to be relied upon and designation of record

Filed January 13, 1943

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service of the above Statement of Points and Designation of Record acknowledged this 9th day of January 1943.

HENRY S. JANON,
Counsel for Appellees.

[File endorsement omitted.]

26 Supreme Court of the United States

No. 629—October Term, 1942

Order noting probable jurisdiction

February 1, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:]. File No. 47130. D. C. U. S., E. Missouri. Term No. 629. The United States of America, Appellant vs. Philip Lepowitch and Marvin Spector. Filed January 6, 1943. Term No. 629 O. T. 1942.